

## Internal Revenue Service

Department of the Treasury  
Washington, DC 20224

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Date:  
April 28, 2010

### Legend

Fund A =

Fund B =

Fund C =

Fund D =

Fund E =

Fund F =

Fund G =

PLR-105138-10

2

Portfolio H =

Portfolio I =

Portfolio J =

Portfolio K =

Portfolio L =

Trust M =

Trust N =

State =

Country =

Type X  
Company  
Index =

Date1 =

Date 2 =

a =

b =

c =

d =

e =

Dear \_\_\_\_\_ :

This responds to your request dated January 29, 2010 and supplemental correspondence dated April 7, 2010, submitted by your authorized representative on behalf of Fund A, Fund B, Fund C, Fund D, Fund E, Fund F and Fund G (each a "Fund" and, together, the "Funds"). The Funds request that the Internal Revenue Service rule that: (1) income and gain arising from the commodities-linked note described in this letter will constitute qualifying income to the Funds under section 851(b)(2) of the Internal Revenue Code of 1986, as amended (the "Code"), and (2) income derived by the Funds from their investments in controlled foreign corporation subsidiaries will constitute qualifying income to the Funds under section 851(b)(2) of the Code.

### **Facts**

Fund A is a series of Trust M. Each of Fund C, Fund D, Fund E, Fund F and Fund G is a series of Trust N. Each of Fund B, Trust M and Trust N is a business trust organized under the laws of State. Trust M and Trust N are registered as open-end management investment companies under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., as amended (the "1940 Act"). Fund B is registered as a closed-end management investment company under the 1940 Act. Each Fund intends to qualify as a regulated investment company ("RIC") under Subchapter M of the Code.

Each of Portfolio H, Portfolio I, Portfolio J, Portfolio K, and Portfolio L (each a "Portfolio" and, together, the "Portfolios") is a business trust organized under the laws of State and is treated as a partnership for federal income tax purposes. Each Portfolio is registered as an open-end management investment company under the 1940 Act.

Each Fund and Portfolio uses the accrual method of accounting. Fund A has a fiscal year ending on Date 1. Each of the Portfolios, Fund B, Fund C, Fund D, Fund E, Fund F and Fund G has a fiscal year ending Date 2.

Each of Fund C, Fund D, Fund E, Fund F and Fund G intends to invest its assets in one or more entities treated as partnerships for federal income tax purposes. Fund C invests in Portfolio H. Fund D invests in Portfolio I. Fund E invests in Portfolio J. Fund F is permitted to invest in Portfolio H, Portfolio I, Portfolio J, Portfolio K, and other entities treated as partnerships. Fund G is permitted to invest in Portfolio H, Portfolio I, Portfolio J, Portfolio K, Portfolio L, and other entities treated as partnerships. Fund F and Fund G may also make direct investments. Fund A may invest through an entity treated as a partnership that has not yet been formed, in which Fund F and Fund G may also invest.

### **Commodities-linked Note**

Fund A, Fund B, Fund F, Fund G and each Portfolio intend to invest in commodities-linked notes having the terms and conditions of the following note (the "Note"). The Note will be issued at its par value of \$a. The term of the Note will be 13 months. The Note will pay monthly coupon interest at a rate equal to b. The Note's payout will be determined by reference to the Index, a total return index. The Portfolios, Fund A, Fund B, Fund F and Fund G will have the right to put the Note to the issuer at the calculated redemption price based on the closing value of the Index as of the end of the next business day after notification to the issuer. If on any day the Index falls to a level that is c% or less of the beginning value of the Index, the Note will "knockout" and automatically redeem at the calculated redemption price based on the closing value of the Index on the next business day.

The Note's payout upon maturity, redemption, or knockout is determined under a formula that provides for a return of the Note's face amount plus the product of the face amount, a leverage factor, and the adjusted Index return over the applicable period (which product may be positive or negative). The Note will have a leverage factor of d. The adjusted Index return means the percentage change in the Index during the applicable period reduced by an interest rate factor based on e rates and by certain fees, each expressed as a percentage. In addition, upon maturity, redemption, or knockout, the issuer will pay any accrued coupon interest.

Each Fund makes the following representations with respect to the Note:

(1) The issuer of the Note will receive payment for the Note substantially contemporaneously with the delivery of the Note;

(2) While holding the Note, the Portfolios, Fund A, Fund B, Fund F and Fund G will not be required to make any additional payments to the issuer of the Note in addition to the purchase price paid for the Note, whether as margin, settlement payment, or otherwise, during the life of the Note or at maturity;

(3) The issuer of the Note is not subject by the terms of the Note to mark-to-market margining requirements of the Commodities Exchange Act, 7 U.S.C. 2, as amended (the "CEA"); and

(4) The Note is not marketed as a contract of sale of a commodity for future delivery (or option on such a contract) subject to the CEA.

#### Controlled Foreign Corporation

Each of the Portfolios, Fund A, Fund B, Fund F, and Fund G intends to form a wholly-owned subsidiary (each a "Subsidiary" and, together, the "Subsidiaries"). Each Subsidiary will be incorporated as a Type X Company under the laws of Country. Under the laws of Country, a Type X Company provides for limited liability for all holders of

shares. A shareholder's liability is limited to the amount, if any, unpaid with respect to the shares acquired by the shareholder. Each Subsidiary will file an election on Form 8832 to be taxed as a corporation pursuant to § 301.7701-3 of the Procedure and Administration Regulations.

The Funds represent that, although the Subsidiaries will not be registered as investment companies under the 1940 Act, the Subsidiaries will comply with the requirements of section 18(f) of the 1940 Act, Investment Company Act Release No. 10666, and related SEC guidance pertaining to asset coverage with respect to commodity futures and other transactions in derivatives.

Each of the Portfolios, Fund A, Fund B, Fund F and Fund G may invest a portion of its assets in its Subsidiary, subject to the diversification limitations set forth in section 851(b)(3) of the Code. The Subsidiaries are expected to invest primarily in commodities and commodities-related investments but may also invest in other securities.

The Funds represent that each Subsidiary will be a controlled foreign corporation within the meaning of section 957 of the Code (a "CFC"). It is expected that all of the income of each Subsidiary will be "subpart F income" within the meaning of section 952 of the Code, but the Portfolios, Fund A, Fund B, Fund F and Fund G may also receive income from the Subsidiaries that is not properly characterized as subpart F income.

## **Law and Analysis**

Section 851(b)(2) of the Code provides that a corporation shall not be considered a RIC for any taxable year unless it meets an income test (the "qualifying income requirement"). Under this test, at least 90 percent of its gross income must be derived from certain enumerated sources. A corporation that is a partner in a partnership (other than a qualified publicly traded partnership) must look through such partnership for purposes of meeting the qualifying income requirement. Section 851(b)(2) defines qualifying income, in relevant part, as —

dividends, interest, payments with respect to securities loans (as defined in section 512(a)(5)), and gains from the sale or other disposition of stock or securities (as defined in section 2(a)(36) of the 1940 Act) or foreign currencies, or other income (including but not limited to gains from options, futures or forward contracts) derived with respect to [the RIC's] business of investing in such stock, securities, or currencies. . . .

Section 2(a)(36) of the 1940 Act defines the term "security" as —

any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription,

transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Section 2(f)(1) of the CEA provides that the CEA is not applicable to a hybrid instrument that is predominantly a security. Section 2(f)(2) of the CEA provides that a hybrid instrument shall be considered to be predominantly a security if —

(A) the issuer of the hybrid instrument receives payment in full of the purchase price of the hybrid instrument, substantially contemporaneously with the delivery of the hybrid instrument;

(B) the purchaser or holder of the hybrid instrument is not required to make any payment to the issuer in addition to the purchase price paid under subparagraph (A), whether as margin, settlement payment, or otherwise, during the life of the hybrid instrument or at maturity;

(C) the issuer of the hybrid instrument is not subject by the terms of the instrument to mark-to-market margining requirements; and

(D) the hybrid instrument is not marketed as a contract of sale of a commodity for future delivery (or option on such a contract) subject to the CEA.

Section 2(f)(3) of the CEA provides, in part, that for purposes of section 2(f)(2)(C) of the CEA, mark-to-market margining requirements do not include the obligation of an issuer of a secured debt instrument to increase the amount of collateral held in pledge for the benefit of the purchaser of the secured debt instrument to secure the repayment obligations of the issuer under the secured debt instrument.

In addition, the flush language of section 851(b) of the Code provides that, for purposes of section 851(b)(2), there shall be treated as dividends amounts included in gross income under section 951(a)(1)(A)(i) or 1293(a) for the taxable year to the extent that, under section 959(a)(1) or 1293(c) (as the case may be), there is a distribution out of the earnings and profits of the taxable year which are attributable to the amounts so included.

Section 957 of the Code defines a controlled foreign corporation (CFC) as any foreign corporation in which more than 50 percent of (1) the total combined voting power of all classes of stock entitled to vote, or (2) the total value of the stock is owned by United States shareholders on any day during the corporation's taxable year. A United States shareholder is defined in section 951(b) as a United States person who owns 10 percent or more of the total combined voting power of all classes of voting stock of a foreign corporation. The Funds represent that 100 percent of the voting power of the stock of each Subsidiary will be owned by the corresponding Fund or Portfolio, and that each Fund and each Portfolio is a United States person. The Funds represent that each Subsidiary therefore will qualify as a CFC under these provisions.

Section 951(a)(1) of the Code provides that, if a foreign corporation is a CFC for an uninterrupted period of 30 days or more during any taxable year, every person who is a United States shareholder of this corporation and who owns stock in this corporation on the last day of the taxable year in which the corporation is a CFC shall include in gross income the shareholder's pro rata share of the CFC's subpart F income for the taxable year.

Section 952(a)(2) of the Code defines subpart F income to include foreign base company income determined under section 954. Under section 954(a)(1), foreign base company income includes foreign personal holding company income determined under section 954(c). Under section 954(c)(1), foreign personal holding company income includes (among other things): dividends, interest, royalties, rents, and annuities; gains in excess of losses from transactions in commodities (including futures, forward, and similar transactions but excluding certain hedging transactions and certain active business gains and losses); and, subject to certain exceptions, net income from notional principal contracts.

The Subsidiaries' investments may generate foreign personal holding company income under section 954(c), which is subpart F income. Each Fund and Portfolio owning an interest in a Subsidiary will therefore include in income its pro rata share of such Subsidiary's subpart F income for the taxable year in accordance with section 951.

## **Conclusion**

Based on the facts as represented, we rule that income and gain arising from the Note constitutes qualifying income to each of the Funds under section 851(b)(2) of the Code. We further rule that subpart F income of the Subsidiaries attributable to the Funds is income derived with respect to the Funds' businesses of investing in the stock of the Subsidiaries and thus constitutes qualifying income to the Funds under section 851(b)(2).

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or

referenced in this letter. In particular, no opinion is expressed with regard to whether the Funds qualify as RICs under subchapter M of the Code.

This ruling is directed only to the taxpayers requesting it, and is limited to the facts as represented by the taxpayers. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

David B. Silber  
David B. Silber  
Chief, Branch 2  
Office of Associate Chief Counsel  
(Financial Institutions & Products)